TAN KIM HOR

v.

TAN CHONG & MOTOR COMPANY SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ZAINUN ALI J
[SUIT NO: D2-22-1179-2002]
23 OCTOBER 2002

CIVIL PROCEDURE: *Judge - Application to disqualify judge - Judge made adverse findings of fact against plaintiff in earlier action - Whether judge should recuse herself from hearing plaintiff's subsequent action against same defendants - Application of 'real danger of bias' test - Whether adverse comments on conduct of plaintiff in earlier action gave rise to real danger of bias in subsequent action - Whether application to disqualify judge amounted to contempt of court*

CIVIL PROCEDURE: *Contempt of court - Application to disqualify judge - Whether amounts to contempt of court*

This was an application ('the instant application') by the plaintiff that the trial judge recuses herself from hearing and determining the plaintiff's action ('the instant action') for declaratory and injunctive relief against the six defendants herein. In an earlier proceeding, the trial judge had allowed an application by the 6th defendant to strike out a winding-up petition filed by the plaintiff against one of the defendant companies. In striking out the winding-up petition, the trial judge had made several findings of fact against the plaintiff. The instant application was grounded on those findings of fact which the plaintiff contended were adverse comments in respect of his conduct and character. It was thus argued that there was a reasonable apprehension of bias on the part of the trial judge and that a fair trial of the instant action would not be possible because of the prejudgment. The defendants, on the other hand, contended that the instant application was unfounded and contemptuous and, if allowed, would undermine public confidence in the judiciary.

Held:

[1] The correct test to apply is the 'real danger of bias' test as enunciated by the House of Lords in *R v. Gough* [1993] 2 All ER 724 and followed by the Federal Court in *Mohd Ezam Mohd Noor & Ors v. Ketua Polis Negara* [2001] 4 CLJ 701. Applying this test to the circumstances obtaining herein, there was no real danger of bias such that a fair trial of the instant action would not be possible. The adverse findings of fact made by the trial judge

against the plaintiff at the striking out proceedings did not give rise to a real danger of bias on the part of the trial judge in the instant action. The plaintiff was unable to show that the trial judge had allowed unnecessary, inappropriate or irrelevant considerations to pervade her said findings of fact or that they were totally against the weight of the evidence. (pp 441 e-h, 442 a-h & 443 a-e)

[2] An application to disqualify a judge on the ground of bias does **not** amount to contempt of court. The judge must approach such an application without being defensive or resentful. If candour on the part of the judge in expressing his reasons for decision is to be defended then candour on the part of the litigant has to be expected. (pp 443 f-h & 444 a-b)

[Plaintiff's application to disqualify judge dismissed.]

Case(s) referred to:

Alkaff v. Governor-in Council & Ors [1932] MLJ Rep 202 ***(not foll)***
Baintan v. Rajski [1992] 27 NSWLR 539 ***(foll)***
Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors [1995] 2 CLJ 900 CA ***(not foll)***
Livesey v. NSW Bar Association [1983] 151 CLR 280 ***(refd)***
Locabail (UK) Ltd v. Bayfield Properties Ltd [2000] 1 WLR 870
Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 CLJ 65 FC ***(foll)***
Mohd Ezam Mohd Nor & Ors v. Ketua Polis Negara [2001] 4 CLJ 701 FC ***(foll)***
PP v. Lau Tuck Weng [1988] 3 MLJ 217 ***(not foll)***
R v. Bow Street Metropolitan Stipendiary Magistrate & Ors ex p Pinochet Ugarte (No 2) [1999] 1 All ER 577 ***(refd)***
R v. Gough [1993] 2 All ER 724 ***(foll)***
Raphael Pura v. Insas Bhd & Anor [2002] 1 CLJ 397 CA ***(refd)***

For the plaintiff - Muhammad Shafee Abdullah (Azhar Azizan (Walter Preira); M/s Kamarudin & Partners
For the 1st-5th defendants - Wong Chong Wah (Wong Chee Lin); M/s Skrine & Co
For the 6th defendant - Lim Kian Leong; M/s Lim Kian Leong & Co

Reported by Gan Peng Chiang

JUDGMENT

Zainun Ali J:

What I have before me is one of those rare judicial moments where I am asked to recuse myself from hearing and determining all further proceedings in an action, including the trial thereof.

In this action ie, 22-1179-2002, the plaintiff had applied *inter alia* for a declaration that the failure of the 4th, 5th and 6th defendants to reappoint him as director in the said companies was wrong in law, unjustified and therefore null and void; and an injunction to restrain the 1st, 2nd, 3rd, 4th and 5th defendant from passing any resolution or make any decision to oust the plaintiff as director in the said companies.

Thus the present application is brought by the plaintiff that I be at liberty to discharge myself from hearing and determining this present action.

Background

The prelude to this application is actually activated by the truculent winding-up petition No. 28-587-2001 between the plaintiff and the 6th defendant, where the plaintiff was the petitioner.

In that petition, the 6th defendant (as respondent) filed an application to strike out the plaintiff's petition.

In granting the order to strike out, I had made certain findings of fact, which the plaintiff had extracted and categorised at para. 5 of the present application.

My findings of fact are listed below (at plaintiff's para. 5 of this application):

(a) that the plaintiff had threatened to derail the de-merger exercise if the 1st to 8th respondents named in the winding up petition did not agree to wind-up Tan Chong Consolidated Sdn. Bhd. ("TCC");

(b) that the plaintiff had harboured feelings of disquiet against the 1st respondent named in the winding up petition, ie, the 6th defendant herein which had fermented into what appeared to be intense pique;

(c) that the plaintiff's complaints were motivated not by his desire to redress wrongs committed against *inter alia* the plaintiff but instead for a collateral purpose;

(d) that the plaintiff's complaints stemmed from the slights (imagined or otherwise) from a brash, younger man, namely the 6th defendant herein;

(e) that the plaintiff's feelings of disquiet were largely motivated by self-interest and self-preservation and not because there existed a real breakdown of trust and understanding;

(f) that all the agitation was caused almost entirely because the plaintiff had already harboured an intention to wind-up TCC;

(g) that the only complaints of the plaintiff against the 6th defendant herein before the EGM of 11 September 1999 were the decisions made on Nissan JV in China, Subaru JV in China, buying office space in Hong Kong and increasing his and the 2nd respondent named in the winding up petition salaries, without consulting him;

(h) that there was no evidence to show that the 6th defendant herein had exceeded his powers for some illegitimate or ulterior purpose;

(i) that the plaintiff suffered from a bad case of petulance and peevishness which led to mulish resistance to agree to sign the circular resolution approving the de-merger;

(j) that the plaintiff had acted unreasonably;

(k) that the plaintiff had conducted himself in a wanton and unreasonable manner, and that the plaintiff's conduct was in careless disregard of the interests of the other shareholders in the listed company;

(1) that the plaintiff was prepared to put his own selfish interest to wind-up TCC ahead of the interests of the TCMH Group and all its public shareholders as well as the interest of TCC and its shareholders as a whole;

(m) that the plaintiff's complaints after 11 September EGM were largely against the conduct of the 6th defendant named herein *viz-a-viz* his position in TCC which mostly concerned management issues relating to the 4 public listed companies and should be dealt with at the public listed companies' management level, and that such allegations were in any event irrelevant to justify reasons to wind-up TCC.

(n) that the plaintiff had a collateral purpose and bad faith in filing the petition;

(o) that the plaintiff seemed determined at all cost to wind up TCC to the extent where they had failed to disclose facts to the court;

(p) that the plaintiff could not justify that he was oppressed and denied participation in the affairs of TCC when the petitioners and several of their family members were actively involved in the management of TCC and companies within the Tan Chong Group of Companies.

(q) that what the plaintiff found galling was to be outvoted on most counts;

(r) that the only thorn in the flesh of the plaintiff was that the respondents named in the winding up petition were in effective control by virtue of their collective shareholding, while the petitioners were not;

(s) that the plaintiff's maudlin preoccupation with tradition and remembrance of things past got in the way of the practical, pragmatic corporate governance of the day; and

(t) that the plaintiff had well and truly put paid to his expectation that equitable considerations would continue to bind the parties.

The Plaintiff's Case

The plaintiff's case is that, in delivering my grounds of judgment in the application to strike out, the above findings and comments on the conduct and character of the plaintiff were adverse to the plaintiff and that an impartial, reasonable and fair minded person with knowledge of the relevant facts, in the light of the said findings, would entertain a reasonable suspicion that there is a real likelihood that a fair trial of this action and proceeding will no longer be possible, because there is an appearance of bias by reason of prejudgment.

The Defendant's Case

The defendant on the other hand says that the plaintiff's allegations of prejudgment and bias is firstly contemptuous. Secondly, the defendant says that there are no grounds upon which the application for recusal can be justified.

Thirdly, that if the plaintiff's application is allowed, it would undermine public confidence in the system of justice in this country.

The defendant added that in making the said findings, the court was merely exercising its judicial function, based on the evidence and if the plaintiff's application is allowed, it would amount to giving the public an impression that the court had in fact not acted upon the evidence before it.

Counsel for both parties had submitted on the points raised, skillfully avoiding terms or language that would or could rile the bench.

The Applicable Test

I shall begin by looking at the tests to be applied, gleaned as they are, from the body of authorities found in the Commonwealth. The following set of tests seems to have emerged, for applications seeking to disqualify the judicial arbitrator for bias. They are:

(a) The real suspicion of bias test;

(b) The real likelihood of bias test; and

(c) The real danger of bias test.

The mutation of the applicable tests from the 'real suspicion of bias' and/or 'real likelihood of bias' test, to the 'real danger of bias' test in the English jurisdiction, is best illustrated in the decision in *R v. Gough* [1993] 2 All ER 724. In this case, Lord Goff observed that the test is best stated in terms of it being a real danger of bias, rather than a real likelihood of bias, and that the real danger of bias is the preferred test. Lord Goff in clarifying what he meant by 'real danger of bias' said that:

> Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger than real likelihood, to ensure that the court is thinking in terms of **possibility** rather than probability of bias. (emphasis added).

However, the decision in *R v. Gough* had not found favour with other Commonwealth Jurisdictions such as Canada, Australia and New Zealand, which continued to adopt and apply the "real suspicion of bias" test.

Likewise, the Court of Appeal of UK in *Locabail (U.K.) Ltd v. Bayfield Properties Ltd* [2000] 1 WLR 870 observed that R v. Gough was not accepted in Australia, South Africa, Scotland and the European Court of Human Rights, which continued to apply the "reasonable suspicion" or "reasonable apprehension" test.

Since *R v. Gough*, there appears to be no occasion for the House of Lords to review the "real suspicion of bias" test in that case, since the cases on bias after that such as the *R v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 2)* [1999] 1 All ER 577 and Locabail were concerned with "interest bias" or "actual bias", which required "automatic disqualification."

I might mention here that the "bias" principle (whether it is apprehension of bias, likelihood or real danger), must find its justification in the importance of the basic principle that the judicial arbitrator must be impartial.

Its application requires two steps.

Firstly it requires the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits.

The second step is that there has to be an identification of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.

It would be interesting to see whether the above steps are manifested in the present application.

Though the different bias tests have been amply demonstrated in several case laws, the distinction between them is apparent. However, the nicety of the distinction is a question of degree.

The plaintiff favours the "reasonable apprehension test", premised on the principle that the doctrine of disqualification is conjoined with that fundamental principle that 'justice should manifestly and undoubtedly be seen to be done' and that that would be the perception of both the parties and the public.

Thus, going by the "reasonable apprehension of bias test," this is tested by reasonable standards, according to what might have affected the judges' approach.

However in the case of 'real danger of bias test', the threshold for the finding of bias is high – where the party alleging bias has to establish actual bias, or demonstrate real likelihood of probability of bias against the judge and a mere suspicion, however reasonable, is not enough.

The plaintiff's counsel took us through the Malaysian case laws on the question of bias, in trying to establish the test applicable.

Although Malaysian judicial opinion seems to be at variance on this point, it might be noted that the Federal Court in both *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65 and *Mohd Ezam Mohd Nor & Ors v. Ketua Polis Negara* [2001] 4 CLJ 701 followed *R v. Gough* and applied the 'real danger of bias' test; whereas cases such as *Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors* [1995] 2 CLJ 900 and *Alkaff v. Governor-in Council & Ors* [1932] MLJ Rep 202 & *Public Prosecutor v. Lau Tuck Weng* [1988] 3 MLJ 217, preferred the "real suspicion of bias" test.

Thus, as can be seen, the concept of bias is not a nebulous concept but one which is stark. In both *Locabail & Hock Hua* the court held that mere adverse comments do not give rise to accusation of bias in the legal sense, because the law assumes that the judge hearing the case is fair minded and will dispense justice even handedly.

The plaintiff submitted that pursuant to the proper application of any of the three tests to the facts in the present case, it should lead to one conclusion only, and that is – taken from the perspective of the "*reasonable man sitting in court and knowing all relevant facts and/or taking into account all of the relevant fact and circumstances, the only possible conclusion would have been that the judge must be disqualified.*" (emphasis added).

Before going any further, it would be useful to offer a definitive treatment of tke word "Bias".

Put simply, bias is a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues.

Thus, if it can be proven that there is bias, it colours the entire proceeding, which no subsequent finding can cure.

However, it is my view that not all favourable or unfavourable dispositions are objectively justifiable, since such dispositions would not constitute impermissible bias.

For example, surely those who condemn Machiavelli or Macbeth, show objectively justifiable disposition and therefore such comment does not give rise to reasonable apprehension of bias on the part of the speaker.

Thus, if the ground as manifested in this application is that a reasonable man sitting in court may find that there is bias in that the plaintiff may not be given a fair trial on account of my statements in the grounds of judgment and **that** statement has a direct impact upon the issues raised in the present suit, then regard must be had to the question of judicial reasoning in the course of judicial function.

It has always been recognised that judges ground their judicial opinion on logical reasoning based on the material before them, sustained by objective evidence.

In so doing, many judges conserve expressions of belief or disbelief to cases where it is essential to express them.

More specifically, cases may arise where judges feel obliged to express an opinion as to the character of the party. If this fact is the basis of the judge's decision, candour and honesty in the expression of judicial reason requires the conclusion to be stated.

Likewise, if I had come to a conclusion that the plaintiff had acted in a certain way (as in the striking out application), there can be no doubt that it is part of my judicial duty to state my reasons for so doing.

And if this is made in the context of deciding questions of fact by a disclosed reasoning process, if they are necessary to show why such questions have been resolved in a certain way, a failure by me to state them not only breaches my obligation to give reasons, but leads potentially to injustice for the party who would otherwise benefit from them.

To question this, would be in some way, to impugn the judge's neutrality (or as in this case, mine).

The judgment of the judge, will of necessity, be structured to explain the conclusion to which the judicial mind had come to as was done in the striking out order.

Bearing in mind all these factors, the question now is:

What is the applicable test? As the court in *Raphael Pura v. Insas Bhd & Anor* [2002] 1 CLJ 397 seemed to imply, the distinction between the test (or at least two of them ie, reasonable suspision of bias and real danger of likelihood of bias) seems very thin, as alluded to earlier.

It is also well known that in the matter of disqualification or recusal, the alternative tests are sometimes seen as competing.

Thus, if a reasonable person knowing all the material facts would not consider that there was a real danger of bias, it would seem strained to say that nevertheless, he would reasonably suspect bias.

In such circumstances, I feel that one must query whether the law should countenance such refinements. In any event, having regard to the authorities cited by both parties in this application, it is my view that the correct test to be applied in this case is the 'real danger of bias' test, as approved by the Federal Court in *Ezam*'s case, following the *Gough* principle.

Looking again at the plaintiff's application, one might well ask: What is the basis of the plaintiff's application? The short answer to this is that, it is nothing more than the remarks or observations or findings made by me in the striking out order of 12 December 2001, and which the plaintiff now says has a direct impact upon the issues raised in the present suit.

In other words, the plaintiff now suggests that such a judicial denunciation made in the said striking out order carries particular consequences to him.

At its most basic, the event's findings which are not favourable to the plaintiff cannot amount to bias. The mere fact that plaintiff alleges bias is not of itself ground for disqualification of a judge (*Livesey v. NSW Bar Association* [1983] 151 CLR 280).

Based on the real danger of bias test, each case must be judged on its own facts and one must be cautious not to take the words out of context and magnify them to excessive scrutiny.

The plaintiff's contention that the basis of his claim is that he has been ousted as director of the defendant companies on account of the court's findings is unsustainable, and verges on sheer exaggeration.

There is no identification of the connection between this phenomenon and the feared deviation by me from the course of deciding the case on it merits.

Even if the natural human desire for consistency of thought might be thought to operate to incline a judge to uphold an opinion expressed earlier, this cannot constitute or ground an allegation of real danger of bias, since this would involve a finding by the plaintiff that I was in fact unable to and did not comply with my judicial obligation; or that the court had acted on wrong principles and based its decisions or findings on erroneous considerations, or that insufficient weight was given to relevant matters.

It is not shown that I had allowed unnecessary, inappropriate or irrelevant consideration to intrude into my findings about the plaintiff in the striking out order.

More importantly, the real danger of bias test, would invite a finding that the judge did not attend to the evidence properly, but rather, reached a decision determined by reference to previously expressed views.

Obviously the plaintiff in his application showed no such propensity on my part, or made such a finding itself.

On this rather equivocal and flimsy stand, the plaintiff's ground must fail.

I would stress yet again that the findings made by me were grounded on the facts and materials before me and bias cannot flow simply from a finding, *albeit* one which is critical of a party, provided the evidence to which I have had regard, supports such a finding.

The next question is whether, in making this application, the plaintiff had transgressed the bounds of propriety and had therefore committed contempt.

I take this 'transgression' as simply an incident of judicial office, of which no busy judge can escape.

I suppose different judges respond differently to allegations of judicial bias. There are of course, various restraints which tend to discourage the making of the accusation of bias, unless it is deemed serious and relevant.

In any case, if candour on the part of the judge in expressing his reasons is to be defended, so candour on the part of the litigants must be expected.

But when it is made, it is essential that the judge should approach it without being defensive or resentful.

Thus I would take the approach as that taken by the court in *Baintan v. Rajski* [1992] 27 NSWLR 539, that an application that a judge disqualify himself for bias is not contempt.

Based on the foregoing there is therefore no valid and good reason to allow the plaintiff's application to disqualify me from hearing and determining all further proceedings in this action.

The plaintiff's application is therefore dismissed with costs.